VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Cabot Creamery Cooperative, Inc.
Land Use Permit #5W0870-13-EB

MEMORANDUM OF DECISION

This decision pertains to preliminary issues raised in an appeal of a permit issued for land application of dairy processing wastewater and washwater resulting from the operation of a cheese production plant located in Cabot. As is explained below, the Environmental Board denies the request of Richard Scheiber (the Appellant) for party status on Criterion 9(F) (energy conservation) of 10 V.S.A. § 6086(a) and will issue a supplemental decision concerning his request for party status on Criterion 9(K) (public investments and facilities). The Board also denies the cross-appeal filed by Cabot Creamery Cooperative, Inc. (the Applicant) challenging the Appellant's party status and appeal rights on Criteria l(B) (waste disposal), 5 (traffic), 7 (municipal services). The Board further denies the request of the Appellant to make Agri-Mark, Inc., a co-applicant and his request to overturn the District #5 Commission's decision to waive the co-applicancy requirement for the owners of land application sites. Finally, the Board concludes that a portion of this application which seeks to delete a condition from a prior permit requiring construction of a waste treatment plant may be barred under the doctrine of collateral estoppel but, using its discretion, declines to bar that portion of the application provided that the Applicant makes certain proofs as specified below.

I. BACKGROUND

On June 29, 1992, the District #5 Environmental Commission issued Land Use Permit #5W0870-13 (the Permit), authorizing the Applicant to use a land application program for the disposal of dairy processing wastewater and washwater resulting from the operation of its production plant in the Village of Cabot. Proposed land application sites are located in Marshfield, Hardwick, Walden, and potentially other towns. The permit also deletes Condition **1** from Land Use Permit #5W0870 (Revised) and Condition 5 from Land Use Permit #5W0870-3A. These conditions had, respectively, required construction of a waste treatment facility by 1991 and prohibited the use of manure pits for the injection of waste byproducts.

The Permit was issued without supporting findings of fact and conclusions of law. On July 23, 1992, the District Commission issued findings and conclusions in support of the Permit. On July 28, the Appellant filed a motion to alter the

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Permit with the District Commission pursuant to Rule 31(A). On August 27, the District Commission issued a decision on the motion to alter, granting it in part and denying it in part. The District Commission also issued revisions to its findings,

On September 28, 1992, the Appellant filed an appeal with the Board. On October 13, the Applicant filed a cross-appeal.

On November 2, 1992, Board Chair Elizabeth Courtney convened a prehearing conference in Montpelier. During the prehearing conference, the Appellant filed a petition for party status and a response to the cross-appeal.

On November 10, 1992, the Chair issued a prehearing conference report and order. During the remainder of November, parties filed memoranda of law concerning the issues addressed in this decision. In one of his memoranda of law, the Appellant requested clarification of who should be served with future filings in this matter.

II. ISSUES

a. Whether the Appellant's party status, and therefore the scope of his appeal: (1) should include criteria other than those on which he had party status before the District Commission, and (2) should not include some of the criteria on which he had such status.

b. Whether, under Rule 10(A), the Board should require Agri-Mark, Inc. and the owners of land-application sites to be co-applicants,

c. Whether the Board should grant the Appellant's request that the Applicants be required to make proofs concerning construction of a waste treatment plant.

III. DISCUSSION

A. Party Status

The District Commission granted the Appellant party status on Criteria l(B), 5, 7, and 8 (aesthetics) and he states that he appeals all four of these criteria. The District Commission denied a request by the Appellant for party

status on Criterion 9(K) and the Appellant appeals that denial, The Appellant did not request party status before the Commission on Criterion 9(F) but seeks such status before us.

We have stated previously that, with two exceptions discussed below, a party may appeal only those, criteria on which he or she had party status before the District Commission. Re: Sherman Hollow. Inc., #4C0422-5-EB, Memorandum of Decision at 4 (Feb. 3, 1988). The controversy over the Appellant's party status, therefore, involves the scope of the issues which will be heard as part of his appeal.

The Appellant seeks to expand his party status to include Criterion 9(F) so that the Board will review that criterion as part of this appeal. Based on the language of Rule 40(D), we have stated that a party may appeal a criterion on which he did not have or seek party status before'the District Commission if he can persuade us not only that he qualifies for party status but also that a substantial injustice or inequity would occur if appeal on the criterion were disallowed. Id. We are not persuaded by the Appellant's filings concerning his request for party status on Criterion 9(F) that such an injustice or inequity would occur.

The Appellant also seeks to expand his party status and therefore the scope of this appeal to include Criterion 9(K). Based on the language of 10 V.S.A. § 6089(a) and Rule 40(A), we have stated previously that a person may appeal a decision of a district commission regarding party status to the Board, that we will review such an appeal in a de novo fashion applying our own independent judgment, and that if we are persuaded that an appellant should be granted party status, we will hear his appeal on the criterion. Re: Swain Development Corp., #3W0445-2-EB, Memorandum of Decision at 6-7 (July 31, 1989). We are evaluating the Appellant's request on this basis and are not yet prepared to issue a decision. We intend to deliberate again soon concerning the Criterion 9(K) request and to issue a supplemental decision.

The Applicant challenges the Appellant's party status on Criteria l(B), 5, and 7. Based on the filings made by the parties with regard to this issue, we conclude that the Appellant should maintain his party status on these criteria. Specifically, with respect to Criterion l(B), above, the Appellant qualifies as a materially assisting party pursuant to Rule 14(B)(l)(b) because of arguments he has submitted, and evidence and arguments he plans to submit, regarding the necessity of a waste treatment plant for the proposed project and the potential impacts of land application of project wastes. Concerning both Criteria 1(B) and

5, the Appellant qualifies as an interested party pursuant to Rule 14(B)(l)(a) because trucks carrying wastes for land application will pass his residence, possibly spraying wastes because of overburden, adverse road conditions, or poor driving, as well as potentially having other adverse effects. With regard to Criterion 7, the Appellant qualifies as an interested party pursuant to Rule 14(B)(l)(a) because trucks used in the proposed land application will travel on Class III town roads, and the potential adverse impact of such truck use may mean increased road maintenance costs for the Town of Cabot and consequently may affect the Appellant's tax burden.

Accordingly, the scope of this appeal will include Criteria l(B), 5, 7, and 8. In thus stating the appeal's scope, we note that the issues under these criteria are limited as discussed in the prehearing report issued on November 10, 1992.

B. Co-Applicancv

Rule 10(A) specifies that the record owners of all involved land shall be co-applicants unless good cause is shown to waive this requirement. The rule also states that, at any time in a proceeding, the Board and District Commissions may conclude that the property interest of a person is so significant that the person must be added as a co-applicant.

The Appellant seeks a ruling that Agri-Mark, Inc. and the owners of various land application sites be co-applicants.

The filings before us suggest that Agri-Mark, Inc. is a Massachusetts corporation which during the course of this application has become the parent corporation of the Applicant. We do not see in any of the filings a persuasive allegation that Agri-Mark has a property interest in any of the land involved in the proposed project. Consequently, the Appellant's request that Agri-Mark be required to be a co-applicant is denied.

On March 8, 1991, the District Commission issued a memorandum of decision in which it found that good cause exists to waive the requirement to have the owners of land application sites be co-applicants. We agree with the District Commission's decision for the reasons stated therein.

C. Waste Treatment Plant

1. Background

Part of this application seeks to delete a condition in an earlier permit issued to the Applicant concerning its cheese production plant in Cabot. The condition relates to construction of a waste treatment plant. To understand the controversy surrounding the removal of this condition, we must review its history. We therefore take notice pursuant to 3 V.S.A. § 810 of the relevant decisions of the District #5 Commission: Land Use Permit #5W0870 and supporting findings of fact and conclusions of law, issued September 15, 1986; and Land Use Permit #5W0870 (Revised) and supporting decision, issued October 29, 1986. We also take notice of application #5W0870-13, filed by the Applicant on November 8, 1990. We may exercise our authority to take notice at any stage of the proceedings. In re Handy, 144 Vt. 610, 612-13 (1984).

The District Commission's findings concerning application #5W0870 began with an introduction which states in relevant part:

> On April 25, 1986, an application for an Act 250 permit was filed by Cabot Farmers' Cooperative Creamery Company, Inc., Box 128, Cabot, Vermont for a project generally described as the construction of a new truck bay, a 50,000 gallon waste disposal holding tank, a 30,000 gallon whey storage silo and a 50,000 gallon milk storage silo. These improvements will be made at the Creamery's facility in Cabot, Vermont. Additionally, this application encompasses a review of overall waste disposal practices including a spray irrigation site on the Creamery tract and multiple land application sites throughout the towns of Cabot, Marshfield, Hardwick, Walden, Danville and Greensboro.

(Emphasis added.)

As part of its review of waste disposal for the Applicant's plant, the District Commission considered the construction of a waste treatment plant. In relevant part, the District Commission stated under Finding of Fact l(B) (waste disposal):

> The crucial element in the Commission's review of this application is the applicant's consistent statement of intent to proceed with a phased program culminating in the construction of a waste treatment facility which will replace the current methods of disposal

> herein discussed. (Exhibit 2 - Applicant). The construction and operation of the treatment facility were estimated as being a reality no later than 1991 and, perhaps, as soon as 1988 (Exhibit 20 - Applicant). Pursuant to Environmental Board Rule 2(G) and 2(F), this treatment facility will be subject to the review and approval of this Commission prior to construction.

Thus, it appears that the Applicant proposed a waste treatment plant as part of application #5W0870. This is confirmed by the Applicant's own filings before us.

Based on the above-referenced Finding of Fact l(B), Land Use Permit #5W0870 stated in Condition 11:

> The uses of the land application sites and the spray irrigation system are authorized until November 1, 1991. By November 1, 1990, the permittee shall fully advise the Commission of the status of its design work for the construction of a permanent waste treatment facility.

The District Commission's decision on application #5W0870 states that the Appellant was granted party status on ths application under Rule 14(B). Within 15 days of the District Commission's decision on the application, the Appellant and another permitted party filed a motion to alter pursuant to Board Rule 31(A). This motion resulted in Land Use Permit #5W0870 (Revised).

The decision supporting the revised permit states that the motion addressed three areas of concern, including in relevant part:

> The establishment of November 2, 1991 as a deadline by which time a permanent waste treatment facility will be completed and fully operational. The parties requested that condition #11 in the permit be revised to include this requirement.

The District Commission's decision on this portion of the motion was as follows:

> The Cornmission has decided to grant the parties' request regarding the revision to condition #11. The original proceedings were characterized by representations from the permittee that such a treatment facility would be constructed by no later than 1991. This

> view is clearly reinforced by the permittee's description of the mandate as stated in its October 8th response. The Commission concludes that the revised condition #11 will provide increased clarity and a statement of intent relative to the final and permanent resolution of the waste disposal issues addresed [sic] in our September 15th decision.

Accordingly, the District Commission issued Land Use Permit #5W0870 (Revised), which in Condition 1 revised Condition 11 to read as follows:

> The uses of the land application sites and the spray irrigation system are authorized until November 1, 1991. By November 1, 1990, the permittee shall fully advise the Commission of the status of its design work for the construction of a permanent waste treatment facility. The permanent waste water treatment facility will be completed and be fully onerational by no later than November 2, 1991.

(Emphasis added.)

The District Commission's decisions regarding application #5W0870 were not appealed to the Board pursuant to 10 V.S.A. § 6089(a).

On November 8, 1990, the Applicant filed the amendment application which is the subject of this appeal. Part of the application includes a request to delete Condition 11 of Permit #5W0870 as revised by Condition 1 of Permit #5W0870 (Revised). From the fact that this application was filed, we believe it reasonable to infer that the Applicant did not submit design plans for the treatment plant to the District Commission and did not construct the treatment plant by the November 2, 1991 deadline.

2. Discussion

The Appellant argues that because of the existence of prior conditions requiring construction of a waste treatment plant by the Applicant, the Applicant should be required to prove that construction of such a plant is impossible before it is allowed to seek an amendment to delete the condition and approve a land application program. The grounds for this argument include contentions that parties are entitled to rely on the representations of applicants in Act 250 proceedings, to rely on conditions that are placed in permits as the result of those proceedings, and to some semblance of finality in the Act 2.50 process.

The Appellant's claim resonates with questions of reliance and finality. Accordingly, we believe that it is appropriate to review the Appellant's claim in light of the doctrine of collateral estoppel.'

The doctrine of collateral estoppel is a variant of the doctrine of res judicata. Both doctrines were invented by the courts to prevent repetitive litigation and to assure parties of finality. Berisha v. Hardy, 144 Vt. 136, 138 (1984).

Collateral estoppel is a doctrine which applies to issues litigated in previous proceedings. It is often referred to as "issue preclusion." If the various elements of that doctrine are met, relitigation of an issue may be barred. Trepanier v. Getting Organized. Inc., 155 Vt. 259, 265 (1990). The various elements of collateral estoppel are discussed below.

Res judicata[2] may be applied to proceedings before administrative agencies but may be relaxed in the face of important policy or practical considerations. Town of Springfield. Vermont v. Environmental Board, 521 F.Supp. 243 (1981). The Vermont Supreme Court has stated that both res judicata and collateral estoppel may be applied to zoning applications but not as "inflexible rules of law." In re Application of Carrier, 155 Vt. 152, 157, 158 (1990). We have previously recognized the applicability of both doctrines to Act 250 proceedings. Re: John A. Russell Corn., #1R0257-2A-EB, Memorandum of Decision at 5-6 (Oct. 22, 1992).

The elements of collateral estoppel were stated by the Supreme Court in the Trepanier case cited above. Those elements, and our decision regarding their applicability to the present case, are as follows:

1. Preclusion must be asserted against one who was a party or in with a party in he earlier action. This case involves the same applicant as did application #5W0870.

'Parties have been given the opportunity to brief the applicability of collateral estoppel. See prehearing conference report dated November 10, 1992.

[2]*Res iudicata is a broader doctrine than collateral estoppel, applying to entire cases and causes of actions. Berisha supra, 144 Vt. at 138.*

2. The issue was resolved by a final judgment on the merits. The District Commission issued final decisions which contained the original Condition 11 and the Condition as later revised. The revised condition stated that the Applicant would be required to construct a waste treatment plant. Thus, there was a final judgment on the merits of whether the Applicant should be required to construct a waste treatment plant.

The Applicant argues that the past judgments were not final because the condition allowed that final designs for the waste treatment plant would be submitted subsequently. In support of this argument, the Applicant points to the above-quoted language from the October 1986 decision supporting the revised condition regarding "final and permanent resolution of the waste disposal issues."

We do not interpret the language of the District Commission's October 1986 decision so broadly. Pursuant to that decision, the District Commission revised Condition 11 to state that construction of a waste treatment plant would be required by November 2, 1991. The language of the decision must be interpreted in light of the condition, and nothing about the District Commission's condition indicated that it intended to revisit the issue of whether a treatment plant should be constructed. Rather, the condition states only that, prior to construction, design plans for the plant would need to be submitted for review and approval. Thus, while it is true that the District Commission had not issued a final judgment approving the design for the treatment plant, this does not negate the fact that the District Commission had conditioned its permit with a requirement that a treatment plant must be constructed. The issue of whether a plant must be constructed is different from the issue of what the plant's design will be.

3. The issue is the same as raised in a later action. In the previous application #5W0870, the Applicant proposed the creation of the waste treatment plant as a measure to mitigate the impacts of its cheese production plant under Criterion l(B) (waste disposal). Therefore, at issue in that application proceeding was whether the waste treatment plant is needed to mitigate such impacts. In the current amendment proceeding, the Applicant seeks to delete a condition requiring it to construct a waste treatment plant. Thus, an issue in this matter is whether the waste treatment plant is needed to mitigate the project's impacts under Criterion l(B). Accordingly, the issue is the same.

4. There was a full and fair opportunity to litigate the issue in the earlier action. The burden of proof on this element of collateral estoppel is on the Applicant. Trepanier, supra, 155 Vt. at 266. We are not persuaded that the

Applicant did not have a full and fair opportunity to litigate this matter in the prior proceeding. The Applicant proposed the waste treatment plant as part of its application. The Applicant went through an application proceeding and a motion to alter concerning the waste treatment plant. The Applicant had the opportunity to appeal the decision containing the condition requiring the waste treatment plant to this Board within 30 days under 10 V.S.A. § 6089(a).

5. Applying collateral estoppel in the subsequent action must be fair. The burden of proof under this element of collateral estoppel is also on the Applicant. Id.

We are not persuaded that applying collateral estoppel in this proceeding would be unfair because the Applicant proposed the waste treatment plant in the first place. We note the Applicant's argument that the waste treatment plant was only proposed as a mitigation measure for a planned expansion which it states has not occurred and will not occur. However, the language of Condition 11, as revised by Condition 1 of Permit #5W0870 (Revised), is not contingent on any such planned expansion. The Applicant could have moved the District Commission under Rule 31(A) to alter the condition to make it so contigent or could have appealed the District Commission's condition to the Board pursuant to 10 V.S.A. § 6089(a) and Rule 40(A). The Applicant did not pursue either of these options.

An additional reason why we believe applying collateral estoppel is fair is that other parties have reason to rely on representations and proposals made by applicants in Act 250 proceedings. Re: Department of Forests and Parks. Knight Point State Park, Findings of Fact, Conclusions of Law and Order #6G0062-EB (Sep. 8, 1976). In this regard, we note that the Appellant was a party to the prior proceedings.

We therefore conclude that the elements of collateral estoppel are met in this case. But we do not believe that this is the end of our inquiry. As stated above, res iudicata and collateral estoppel do not apply to administrative proceedings as inflexible rules of law. Rather, we have the discretion not to apply these doctrines because of policy or practical considerations.

There are two sets of policy considerations are at work in this case. On the one hand, we recognize that there is significant value in finality to Act 250 decisions so that all parties have some assurance that decisions will not be re-litigated and so that parties may rely on representations that applicants make concerning proposals to mitigate environmental and public health impacts. Not

only should we favor finality so that parties may rest assured, we also should favor finality in order to protect the environment and the public health, safety and welfare. If conditions to mitigate impacts can simply be ignored and not complied with, and instead re-litigated at a future date, the protection of the public and the environment from the impacts those conditions are designed to remedy is less likely to occur. In such a circumstance, the Act 250 decision-making process will become less one of making decisions which are adhered to, and more one of picking the time and composition of Act 250 tribunal most favorable to one's interest.

On the other hand, there may be times when an Act 250 permit condition should be modified because an applicant has in good faith changed its plans, or because a condition contained in the decision may no longer be the most cost-effective or best way to meet the goal of mitigating impacts. It is surely bad policy to require applicants to perform conditions when they no longer intend to cause the impacts which gave rise to the conditions, or when another condition may achieve the same level of protection, or a higher level of protection, in a more cost-effective way. The goal is not to make an applicant spend money but to protect the public health, safety, and welfare, and the environment.

The former set of policies discussed here favor applying collateral estopped. The latter set of policies disfavors applying it.

Accordingly, seeking a balance of these policies to give each set due credit, we conclude that we should forbear to apply collateral estopped in this matter, provided that the Applicant makes the following proofs.

First, the Applicant must prove to us that changes have occurred that preclude the need for, or construction of, a waste treatment facility. Such changes may consist only of: (a) changes in factual or regulatory circumstances beyond the control of the Applicant; (b) changes in the construction or operation of its cheese production plant, not reasonably foreseeable at the time the Permit was issued; or (c) changes in technology or treatment methodology for dairy wastes.

Second, the Applicant must prove to us that the current application is a direct outgrowth of the above-referenced changes.

Under the circumstances of this case, we believe the Applicant should have to meet this burden in addition to demonstrating compliance with the Act 250 criteria.[3]

D. Other Matters

The Appellant has requested that we clarify the service requirements in this matter. We conclude that only those parties who appeared at the prehearing conference need be served and will issue an order so stating. We will continue to send documents we issue to all listed on the certificate of service.

Due to the timing of our decision, we have decided to change several of the filing dates in the prehearing order to allow parties more time. We do not believe additional time w-ill be needed if we decide that Criterion 9(K) is part of this appeal, since much of the evidence under that criterion will likely be the same as the evidence to be supplied under Criteria 5 and 7.

IV. ORDER

1. The Appellant's petition for party status under Criterion 9(F) is denied.

2. The Board will deliberate further concerning the Appellant's petition for party status under Criterion 9(K) and issue a supplemental decision. This deliberation likely will occur by teleconference on December 30, 1992.

3. The Applicant's cross-appeal is denied.

4. The Appellant's requests concerning co-applicancy are denied.

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[3]The Supreme Court has stated that we may go beyond the Act 250 criteria in order to protect the environment and the public. In re Hawk Mountain Corp., 149 Vt. 179, 184 (1988). We believe that all of the policy considerations which we have noted above in support of our decision stem from the protection of the environment and the public health, safety, and welfare.

5. The scope of this appeal shall include the compliance of this application with Criterion l(B), 5, 7, and 8, as the issues under those criteria are set out in the prehearing conference report issued for this matter on November 10, 1992.

6. In addition to the Applicant's burdens with respect to demonstrating compliance with the criteria at issue in this appeal, the Applicant must prove to us that changes have occurred that preclude the need for, or construction of, a waste treatment facility. Such changes may consist only of: (a) changes in factual or regulatory circumstances beyond the control of the Applicant; (b) changes in the construction or operation of its cheese production plant, not reasonably foreseeable at the time the Permit was issued; or (c) changes in technology or treatment methodology for dairy wastes. The Applicant also must prove to us that the current application is a direct outgrowth of the above-referenced changes.

7. Paragraph 10 of the November 10, 1992 prehearing order may be interpreted to require service only on the following parties: the Applicant, the Appellant, and the Agency of Natural Resources.

8. The deadline contained in paragraph 4 of the November 10, 1992 prehearing order is extended to January 22, 1993.

9. The deadline contained in paragraph 5 of the November 10, 1992 prehearing order is extended to February 9, 1993.

10. The deadline contained in paragraph 6 of the November 10, 1992 prehearing report is extended to noon on February 19, 1993.

ENVIRONMENTAL BOARD.

Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
William Martinez
Steve E. Wright

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